

Dec 12, 2017

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

EDWARD MC ELMURRY and EVA
MC ELMURRY, INDIVIDUALLY and
the marital community thereof,
Plaintiffs,
v.

RUSSELL INGEBRITSON and JANE
DOE INGEBRITSON
INDIVIDUALLY, and the marital
community thereof and AGENTS/
OWNERS OF INGEBRITSON and
ASSOCIATES, A MINNESOTA
ENTITY,
Defendants.

No. 2:16-cv-00419-SAB

**ORDER DENYING
PLAINTIFFS' MOTION FOR
RECONSIDERATION**

Before the Court is Plaintiffs' Motion for Reconsideration 1) Relief Regarding Failure to Rule on Absence of Mesh Netting in Vehicle; and 2) Proximate Cause, ECF No. 49. Plaintiffs ask the Court to reconsider its Order Denying Plaintiffs' Motion for Summary Judgment, ECF No. 47. The motion was heard without oral argument. For the reasons stated here, Plaintiffs' motion is denied.

**ORDER DENYING PLAINTIFFS' MOTION FOR
RECONSIDERATION + 1**

1 On November 13, 2017, the Court entered an Order denying Plaintiffs’
2 Motion for Summary Judgment, ECF No. 20, because genuine issues of material
3 fact existed. ECF No. 47. Plaintiffs now ask the Court to reconsider its ruling and
4 hold as a matter of law that BNSF’s failure to install mesh netting in the car
5 Plaintiff was driving when he sustained an injury amounts to negligence under the
6 Federal Employers Liability Act (“FELA”), 45 U.S.C. § 51, *et seq.* Plaintiffs
7 contend that in its Order, the Court failed to rule on the issue of the absence of
8 mesh netting to secure tools inside the vehicle. Specifically, Plaintiffs argue that
9 because Defendants failed to refute their proffered evidence on the issue, they are
10 entitled to judgment as a matter of law. Plaintiffs also contend that the Court
11 erred by finding that Plaintiffs have not demonstrated that the absence of the
12 mesh netting was the “proximate cause” of Mr. McElmurry’s injuries.

13 Standard

14 A party may ask the court to reconsider and amend a previous order. Fed R.
15 Civ. P. 59(e) offers “an extraordinary remedy, to be used sparingly in the interests
16 of finality and conservation of judicial resources.” *Carroll v. Nakatani*, 342 F.3d
17 934, 945 (9th Cir. 2003). A Rule 59(e) motion may be granted when: (1) there is
18 an intervening change in controlling law; (2) the moving party presents newly
19 discovered or previously unavailable evidence; and (3) the motion is necessary to
20 correct manifest errors of law or fact upon which the judgment is based. *Turner v.*
21 *Burlington N. Santa Fe R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003).

22 Discussion

23 In its Order Denying Plaintiffs’ Motion for Summary Judgment, ECF No.
24 47, the Court noted that “Defendant has not shown that BNSF’s failure to install
25 reflective tape and *metal barrier* were the proximate cause of his injuries.” *Id.*
26 (emphasis added). The Court further noted that Plaintiffs’ own expert did not
27 opine that Plaintiffs would succeed on their legal malpractice claim. William
28 Schroeder opined that “BNSF’s failure to provide luggage restraints as reflected

1 in McElmurry's declaration, in my opinion creates a jury question as to whether
2 BNSF's failure to provide the luggage restraints contributed in any way, however
3 slight, to Mr. McElmurry's injury." ECF No. 23. Plaintiffs argue that because
4 Defendants did not provide any evidence to refute Mr. Schroeder's opinion, they
5 are entitled to judgment as a matter of law. However, Mr. Schroeder's opinion
6 alone does not entitle Plaintiffs to summary judgment on the issue of whether
7 failure to install mesh netting in the vehicle amounted to negligence; only that,
8 perhaps, Plaintiffs will survive a defense motion for summary judgment. Plaintiffs
9 have offered no evidence that BNSF had a duty to install the mesh netting nor
10 that the failure to do so contributed in any way to Mr. McElmurry's injuries.

11 Plaintiffs also take issue with the Court's use of the word "proximate
12 cause" in relation to a FELA claim. However, in its Order the Court noted that:

13 Under FELA, a railroad is liable in damages to any person it employs
14 for such injury or death resulting in whole or in part from the
15 negligence of any of the officers, agents, or employees of such
16 carrier. 45 U.S.C. § 51. The FELA standard "is simply whether the
17 proof justify with reason the conclusion that employer negligence
18 played any part, even the slightest, in producing the injury or death
19 for which damages are sought." *CSX Transp., Inc. v. McBride*, 564
20 U.S. 685, 692 (2011).

21 ECF No. 47. The Court cited the correct standard in determining that Plaintiffs
22 have not demonstrated that Mr. McElmurry was injured by BNSF's negligence,
23 however slight. Although the use of the words "proximate cause" may have
24 confused the parties, no manifest error was committed. Since Plaintiffs did not
25 prove causation under the FELA standard, their motion for summary judgment
26 was denied. Because Plaintiffs have not shown manifest errors of law or fact upon
27 which the judgment is based exist, their motion for reconsideration is denied.

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**ORDER DENYING PLAINTIFFS' MOTION FOR
RECONSIDERATION + 3**

1 Accordingly, **IT IS ORDERED:**

2 1. Plaintiffs' Motion for Reconsideration 1) Relief Regarding Failure to
3 Rule on Absence of Mesh Netting in Vehicle; and 2) Proximate Cause, ECF No.
4 49, is **DENIED**.

5 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to enter
6 this Order and to provide copies to counsel.

7 **DATED** this 12th day of December 2017.



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13 Stanley A. Bastian
14 United States District Judge
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